# 7 FAM 1280
# LOSS OF NATIONALITY AND TAKING UP A POSITION IN A FOREIGN GOVERNMENT

*(CT:CON-449; 03-25-2013)*
*(Office of Origin: CA/OCS/L)*

## 7 FAM 1281 INTRODUCTION

*(CT:CON-285; 03-06-2009)*

a. This subchapter addresses the subject of development of loss-of-nationality cases involving persons who:

(1) Have accepted, are serving in, or performing the duties of any office, post, or employment under the government of a foreign state or political subdivision thereof;

(2) Have attained the age of 18; and

(3) Have the nationality of the foreign state or have taken an oath of allegiance to the foreign state.

b. The U.S. Supreme Court has ruled that a person cannot lose U.S. nationality unless he or she voluntarily and intentionally relinquishes that status (Vance v. Terrazas, 444 U.S. 252 (1980)). The Supreme Court underscored in Vance v. Terrazas that "expatriation depends on the will of the citizen rather than the will of Congress," and the Department gives great weight to the expressed intent of the individual. However, the Terrazas Court also recognized that intent may be "expressed in words or found as a fair inference from proved conduct," and the Department has taken the view that actions inherently inconsistent with allegiance to the United States may be more probative than words. See 7 FAM 1285 for a fuller discussion of the subject.

c. The presumption stated in 7 FAM 1222, paragraph a, found in 22 CFR 50.40, that a U.S. citizen/noncitizen national intends to retain U.S. nationality applies when he or she accepts nonpolicy level employment in the government of a foreign state. (See 7 FAM 1285 for a discussion on what constitutes a policy-level position which the Department now construes as meaning a head of a foreign state.)

d. If a consular officer becomes aware that a U.S. citizen/noncitizen national accepted a nonpolicy-level position in the government of a foreign state and the individual does not advise you that his or her intent was to relinquish U.S. nationality, the administrative presumption of intent to retain citizenship applies. You should:

(1) See 7 FAM Exhibit 1223 and prepare the Consular Officer Attestation of Non-Loss;

(2) Enter case in ACS System; and

(3) Send attestation to Passport Records for filing attached to Form DS-11, Application for a U.S. Passport, Form DS-82, Application for a U.S. Passport by Mail, or Form DS-4085, Application for Additional Visa Pages, or other passport service. If the person is not applying for a passport, use Form DS-4085, which has been modified for this sort of purpose.

e. If the person indicates that he or she did intend to relinquish U.S. nationality in accepting a nonpolicy-level position in the government of a foreign state, follow the procedures outlined in 7 FAM 1220 for development of a loss-of-nationality case.

f. The presumption of intent to retain nationality is not applicable to a policy-level job, but that said, the intent to relinquish nationality must always be established, including for a foreign government policy-level position. Much depends on the nature of the position. Many policy-level jobs involve relatively mundane duties, e.g., health, education, etc., which do not have implications for allegiance. Additionally, even higher-level positions with a foreign government may not be inconsistent with loyalty to the United States. In Vance v. Terrazas, the U.S. Supreme Court recognized that intent can be expressed "in words or found as a fair inference from conduct." (See 7 FAM 1285 for a discussion of the Department position that for the purposes of INA 349(a)(4) (8 U.S.C. 1481(a)(4)) a policy level position constitutes a head of a foreign state.) Development of a loss of nationality for a person in such a position is explained in 7 FAM 1286.

# 7 FAM 1282 AUTHORITIES

*(CT:CON-285; 03-06-2009)*

a. INA 349(a)(4) (8 U.S.C. 1481(a)(4)), as amended, provides that a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by voluntarily performing any of the following acts with the intention of relinquishing United States nationality:

"(4)(A): Accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof, after attaining the age of eighteen years if he has or acquires the nationality of such foreign state.

(4)(B): Accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof, after attaining the age of eighteen years for which office, post, or employment an oath, affirmation, or declaration of allegiance is required."

b. The following chart summarizes INA 349(a)(4) and Section 401(d) of the

Nationality Act of 1940:

| Statute – Expatriating Act | Dates of Application | Notes |
|---|---|---|
| INA 349(a)(4)(A) (8 U.S.C. 1481(a)(4)(A)) | On or after December 23, 1952 | Must be a citizen of the foreign state, over the age of 18, when accepting or performing employment. |
| INA 349(a)(4)(B) (8 U.S.C. 1481(a)(4)(B)) | On or after December 23, 1952 | Must take an oath, affirmation or declaration of allegiance to the foreign state, over the age 18, when accepting or performing employment. |
| Section 401(d) NA | On or after January 13, 1941, but prior to December 23, 1952 | Must be employment for which only nationals of the foreign state are eligible; no national could be expatriated under the age of 18 in light of Section 403(b) NA. |

c. Employment of an officer of the United States: The United States Constitution (Article I, section 9, clause 8) prohibits the acceptance of civil employment with a foreign government by an officer of the United States without the consent of Congress.

d. A 1994 statute (codified at 10 U.S.C. 1060) provides that a retired member of the U.S. armed services may accept employment with, or hold an office or position in, the military forces of a newly democratic nation if the Secretary of Defense or the relevant branch of the armed services and the Secretary of State jointly approve the employment or the holding of such office or position. (See 22 CFR Part 3a.) Within the Department of State, questions about this subject are handled by the Bureau of Political-Military Affairs (PM) and the Office of the Assistant Legal Adviser for Political and Military Affairs (L/PM).

# 7 FAM 1283 POSITION IN THE GOVERNMENT OF A FOREIGN STATE, INTERNATIONAL ORGANIZATION OR POLITICAL ARM OF A PARAMILITARY ORGANIZATION

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a. Employment in an international organization: Employment with an international organization, even if the person is hired as a foreign national, is not potentially expatriating because such organization is not a foreign state.

b. Unrecognized state: Employment with a foreign state whose government is not recognized by the United States comes within the scope of INA 349(a)(4), provided that the state satisfies the recognized elements for statehood. The existence, in fact, of a new state or a new government is not dependent upon its recognition by other states. Refer all questions regarding statehood and new governments to *Ask-OCS-L@state.gov*.

c. Employment with the political arm of a paramilitary organization: Employment with such an organization does not come within the scope of INA 349(a)(4) since it is not employment with a foreign state:

(1) However, if the organization becomes the official government of the foreign state, whether recognized as such by the United States or not, the U.S. citizen could come within the scope of INA Section 349(a)(4);

(2) A U.S. citizen engaged in employment with such an organization, not with a foreign state, could come within the scope of INA 349(a)(7), if convicted by a United States court of "committing any act of treason against, or attempting by force to overthrow, or bearing arms against, the United States, violating or conspiring to violate any of the provisions of 18 U.S.C. 2383 or willfully performing any act in violation of 18 U.S.C. 2385 or violating 18 U.S.C. 2384 by engaging in a conspiracy to overthrow, put down, or to destroy by force the Government or the United States, or to levy war against them, if and when he is convicted thereof by a court martial or by a court of competent jurisdiction";

(3) The consular section of the U.S. embassy or consulate should inform the legal attaché, the regional security officer and the defense attaché of the case and include consular (CPAS), judicial (KJUS, KCRM) and security and political/military tags (ASEC), (PINR), (PTER) in any reporting cables regarding any potential INA 349(a)(7) case addressed to the attention of CA/OCS and the Office of the Assistant Legal Adviser for Law Enforcement and Intelligence (L/LEI) and the Office of the Assistant Legal Adviser for Consular Affairs (L/CA).

d. Employment by Freely Associated States Marshall Islands (RMI), Federated States of Micronesia (FSM) and Palau are exempt from INA 349(a)(4): Section

144(a) of the Compact of Free Association between the United States of America and the Federated States of Micronesia, Republic of the Marshall Islands and the Republic of Palau provides that persons shall not be subject to the provisions of loss of nationality in Section 349 INA, if they are employed by the governments of these independent foreign states (see Public Law 99-239 (RMI and FSM) and Public Law 99-658 (Palau).

# 7 FAM 1284 PREREQUISITES FOR A FINDING OF LOSS FOR POLICY-LEVEL EMPLOYMENT WITH THE GOVERNMENT OF A FOREIGN STATE

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a. INA 349(a)(4) (8 U.S.C. 1481(a)(4)) establishes two separate and distinct prerequisites, one of which must be satisfied before a particular type of government employment can be considered potentially expatriating.

b. INA 349(a)(4)(A) provides for loss of nationality by a person who has or acquires the nationality of the foreign state after attaining the age of 18.

c. INA 349(a)(4)(B) provides for loss of nationality by a person who accepts a position for which an oath of allegiance is required for that employment after attaining the age of 18.

d. A person may obtain a position with a foreign government without risk of loss of U.S. nationality if neither prerequisite applies; that is, after attaining the age of 18 he or she does not:

   (1) Possess the nationality of the foreign state; or

   (2) Take an oath of allegiance to the foreign state.

e. Section 401(d) NA contains the single prerequisite that the employment be employment for which only nationals of the foreign state are eligible. The individual must be a national of the foreign state. Employment must be restricted to nationals of the foreign state; if an alien may hold such a position, even if none were actually employed, the employment is not a potentially expatriating act.

# 7 FAM 1285 WHAT IS A POLICY-LEVEL POSITION WITH A FOREIGN STATE?

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a. Except in a head-of-state or foreign-minister case, we will not typically consider employment in a policy-level position to lead to loss of nationality if the individual says that he or she did not intend to lose nationality. Each policy-

level position case, however, is fully evaluated on a case-by-case basis.

b. Holding a head-of-state, head-of-government, or foreign-minister position may be incompatible with maintaining U.S. citizenship, although the issue has not been expressly decided by the Department. Under international law, as applied in the United States, a foreign head of state, head of government, or a foreign minister (who is not a local national) enjoys absolute immunity from the criminal, civil and administrative jurisdiction of U.S. law, a status that some believe to be inconsistent with continued allegiance to the United States. However others have expressed a contrary view. There is also an issue as to whether this absolute immunity typically enjoyed by a foreign head of state or head of government would extend to a U.S. citizen or would instead be reduced to a more limited immunity such as "official acts" immunity, as the United States does not surrender jurisdiction over its own nationals. A third factor is whether the authorities of the office would be inherently incompatible with U.S. allegiance. Additional considerations would be whether other conduct of the individual is consistent with retention of U.S. citizenship such as whether the individual continued to travel to and from the United States on a U.S. passport and continued to pay U.S. taxes, and similar indicia of intent. The possible expatriation of a head of state is a complex issue that would need to be coordinated with the Office of the Legal Adviser, including the Offices of the Assistant Legal Adviser for Consular Affairs (L/CA) and the Assistant Legal Adviser for Diplomatic Law (L/DL). Please refer all head-of-state and head-of-government cases to CA/OCS/L (*Ask-OCS-L@state.gov*) because, as noted, sensitive questions regarding the scope of immunity, its applicability to a U.S. citizen, possible waiver of immunity, authorities of the office, and expatriation, arise.

c. In 1987, a Federal district court upheld the citizenship of a U.S. citizen serving as a member of a foreign legislative body, despite certain statements in the record indicating a transfer of allegiance. The court ruled that Rabbi Kahane's formal declaration to retain citizenship made simultaneously with the expatriating act preserved his citizenship. (See Kahane v. Schultz, 653 F. Supp. 1486 (1987).)

# 7 FAM 1286 DEVELOPING A LOSS-OF-NATIONALITY CASE FOR SERVICE IN THE GOVERNMENT OF A FOREIGN STATE

*(CT:CON-449; 03-25-2013)*

a. If you are presented with a case of a U.S. citizen or dual national who is running for or holds the position of head of a foreign state or foreign government, or other very high-level foreign government position, you must notify your liaison officer in CA/OCS/ACS and CA/OCS/L (*Ask-OCS-L@state.gov*) by email followed by a cable with the following information (if

available):

(1) Name;

(2) Date/place of birth;

(3) How U.S. citizenship was acquired;

(4) Does the person have the nationality of the foreign state? If so, how and when did the person acquire foreign nationality?

(5) Position in foreign government;

(6) Description of duties;

(7) If elected or appointed;

(8) Did the position require the taking of an oath of allegiance? If so, provide text of oath; and

(9) Any statements made by the individual regarding intent to retain or relinquish U.S. citizenship.

b. CA/OCS will prepare an instruction to the post, in coordination with CA/OCS/ACS, CA/OCS/L, L/CA, and the regional bureau. This will include guidance about whether to request the foreign head of state or other very high-level office holder to complete the loss-of-nationality forms outlined in 7 FAM 1212. If the head of the foreign state declines to complete Form DS-4079, Questionnaire: Information for Determining Possible Loss of U.S. Citizenship, intent and voluntariness will be determined based on conduct.

c. Often, a foreign government demands as a matter of practice, or requires as a matter of law, that a U.S. citizen seeking such a position demonstrate undivided loyalty by renouncing U.S. nationality. In that event the individual must choose whether:

(1) To refuse the job and therefore not give up U.S. citizenship; or

(2) To accept the job with the other government and terminate his or her U.S. citizenship.

(3) The Department generally considers such renunciations to be voluntary because the individual had a free choice between renouncing and not running for, or seeking, political office.

d. It is not possible to put one's U.S. citizenship "in suspense" to be somehow "reclaimed" upon leaving foreign government employment. Because of potential subsequent claims that the individual never really intended to renounce, or that the act was involuntary, these renunciations must be thoroughly documented.

# 7 FAM 1287 INQUIRIES FROM U.S. CITIZENS CONTEMPLATING TAKING UP A POSITION IN A FOREIGN GOVERNMENT

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a. Officials at U.S. embassies and consulates and the Department of State in Washington who receive an inquiry from a U.S. citizen/noncitizen national contemplating taking up a high-level policy position with a foreign government may provide copies of the relevant Bureau of Consular Affairs information brochures.

| See … |
| --- |
| Advice About Possible Loss of U.S. Citizenship and Seeking Public Office in a Foreign State |
| Renunciation of U.S. Citizenship |
| Possible Loss of U.S. Citizenship and Dual Nationality |

b. You should not provide any opinions or assurances as to whether such action will result in loss of U.S. nationality. Also, you should never suggest that a temporary finding of loss of U.S. nationality can be made and later reversed. This is not possible.

# 7 FAM 1288 DUAL NATIONALS, PRIVILEGES AND IMMUNITIES, AND REQUESTS FOR TEMPORARY SUSPENSION OF U.S. NATIONALITY

*(CT:CON-285; 03-06-2009)*

a. The United States does not accept U.S. citizens or U.S. noncitizen nationals as diplomats (including ambassadors) of foreign states. U.S. nationals may serve as diplomats in a foreign mission to the United Nations, if the Department concurs, but not as bilateral diplomats. This is based on longstanding policy founded on Article 8 of the Vienna Convention on Diplomatic Relations (VCDR) regarding nationality of members of the diplomatic mission. These individuals are not eligible for U.S. visas and must enter the United States on a U.S. passport.

b. U.S. citizens serving as foreign diplomats would be entitled under the VCDR only to "official acts" immunity from jurisdiction. While this would protect them for acts performed in the course of official duties, it is not a bar to all suits. Moreover, they would still have to appear in court to assert this affirmative defense. Thus, "official acts" immunity would not provide immunity for criminal acts or for civil suits in personal matters.

c. Article 22 of the Vienna Convention on Consular Relations (VCCR) provides that "consular officers may not be appointed from among persons having the nationality of the receiving state except with the express consent of that state which may be withdrawn at any time." It is not the practice of the United States Government to accept a United States citizen as a consul general heading a career consular post or as any other career consular officer. A career consular officer must be a citizen of the foreign state and must bear an "A-1" visa, which cannot be issued to U.S. citizens.

d. The Office of Protocol advises that the United States does not accept requests from sending states to prospectively waive privileges and immunity of a dual national diplomatic or consular officer.

e. If the individual wishes to assume, or remain in, a diplomatic or consular position in the United States, the individual may voluntarily divest himself or herself of U.S. citizenship. Some foreign diplomats elect to renounce U.S. citizenship under these circumstances in order to serve in high-level diplomatic positions to the United States. It is not necessary to renounce U.S. citizenship to take up a position for a foreign government at the United Nations. A dual national or third-country national cannot renounce or relinquish U.S. citizenship temporarily or put his or her U.S. citizenship "in suspense" while, for example, accepting a diplomatic appointment from a foreign government.

f. As a matter of policy, the Department of State does not permit U.S. diplomats to have the nationality of the state to which they are assigned. The Foreign Service Act of 1980 provides that only U.S. citizens may be appointed to the Service as officers at posts abroad and our chiefs of mission to foreign countries may only hold U.S. nationality.

# 7 FAM 1289 UNASSIGNED